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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. ~~1102~~ 204

WILLIAM B. F. HALL, AILEEN HALL SHOAFF, ARTHUR F. HALL, JR., ALVA J. McANDLESS, FRED B. SHOAFF, II,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN RE CAUSE NO. 11920.

CLYDE J. COVER,
The Lincoln National Life
Insurance Company Building,
Fort Wayne, Indiana,
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INDEX

PAGE

General Statement concerning parties and subject of Petition 1

Jurisdictional Grounds 2

The Assignment Issue 2

The Health Insurance Exemption Issue 3

Questions Presented for Review 3

Statutes

The Assignment Issue 4

The Health Insurance Exemption Issue 5

Statement of Case

The Assignment Issue 5

The Health Insurance Exemption Issue 7

Basis of Federal Jurisdiction in United States District Court 8

Argument

The Assignment Issue 9

The Health Insurance Exemption Issue 15

Appendix

Copy of Court of Appeals Opinion 1a

Copy of Court of Appeals Judgment 6a

Cases Cited.

Bell's Estate v. Commissioner, 137 F. 2d 454 (8th C.C.A. 1943) 14

Caldwell v. Campbell, 218 F. 2d 567, (5th C.C.A. 1955) 12

Commissioner v. Clark, 202 F. 2d 94 (7th C.C.A. 1953) .. 12

Commissioner of Internal Revenue v. Giannini, 129 F. 2d 638 (9th C.C.A. 1942) 12

Page

Commissioner v. Ross, 83 F. 2d 18 (6th C.C.A. 1936) 14

Commissioner v. Sannen, 333 U. S. 591, 68 S. Ct. 715, 92 L. Ed. 898 (1947) 12, 13

Dreymann v. Commissioner, 11 T.C. 153 (1948) 14

Epmeier v. United States, 199 F. 2d 508 (42 A.F.T.R. 716) (1952) 7

Galt v. Commissioner, 216 F. 2d 41, (7th C.C.A. 1954) 12

Hall v. Burnet, 54 F. 2d 443 C.A.D.C. (1931); Cert. denied, 285 U. S. 552, 52 S.C. 408, 76 L.E. 942 (1931) 7, 13

Hall v. Burnet, 68 F. 2d 399 C.A.D.C. (1933) 13

Harrison v. Schaffner, 312 U. S. 579; 61 S. Ct. 759, 85 L. Ed. 1055 (1941) 12

Haynes v. United States, ... U. S. ....., 77 S. Ct. 649, ... L.E. ..... (1957) 3, 14, 15

Helvering v. Eubank, 311 U. S. 122, 61 S. Ct. 149, 85 L.E. 81 (1940) 2, 7

Helvering v. Horst, 311 U. S. 112, 61 S. Ct. 144, 85 L. E. 75 (1940) 11, 13

Helvering v. Seatree, 72 F. 2d 67 (C.A.D.C. 1934) 14

Helvering v. Stuart, 317 U. S. 154, 63 S. Ct. 140, 87 L. Ed. 154 (1942) 12

Heyman v. Commissioner, 176 F. 2d 389, (2nd C.C.A. 1949) 12

Hyman v. Nunan, 143 F. 2d 425 (2nd C.C.A. 1944) 12

Lowery v. Helvering, 70 F. 2d 713 (2nd C.C.A. 1934) 14

Mahaffey v. Helvering, 140 F. 2d 879 (8th C.C.A. 1944) 12

Overton v. Commissioner, 162 F. 2d 155 (2nd C.C.A. 1947) 12

Paxson v. Comm. of Internal Revenue, 144 F. 2d 772 (3rd C.C.A. 1944) 12

PAGE

Pearce v. Commissioner, 315 U. S. 543, 62 S. Ct. 754, 86 L.Ed. 1016 (1942) 12

Sumner v. Commissioner, 161 F. 2d 171 (8th C.C.A. 1947) 14

Swartz v. Commissioner, 69 F. 2d 633 (5th C.C.A. 1934) 14

United States v. Haynes, 233 F. 2d 413 (1956) 15

Washington v. Commissioner, 80 F. 2d 829 (2nd C.C.A. 1936) 14

White v. Fitzpatrick, 193 F. 2d 398 (2nd C.C.A. 1951) .. 12

Statutes:

Section 1254(1) U.S.C.A., Title 28 2

Section 22(a), 1940 U.S.C.A. 5

Section 22(b)(5), 1940 U.S.C.A. 5

Section 1331, 1340, 1346(a)(1), U.S.C.A. Vol. 28 .. 8

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THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN RE CAUSE NO. 11920.

To The Honorable, The Chief Justice of the United States, and The Associate Justices of the Supreme Court of the United States.

This is a Petition by William B. F. Hall, Aileen Hall Shoaff, Arthur F. Hall, Jr., Alva J. McAndless and Fred B. Shoaff, II, for this Court's Writ of Certiorari to review a judgment and opinion of the United States Court of Appeals for the Seventh Circuit, rendered in the captioned cause on March 27, 1957, and reported in 242 F. 2d 412 (1957). A copy of Opinion of the Court of Appeals is attached to this Petition. Also attached, in the Certified Appendix to Plaintiffs' Brief (pages 2-9), is a copy of the Opinion of the Court of first instance, the United States District Court for the Northern District of Indiana.

JURISDICTIONAL GROUNDS.

The judgment which Petitioners seek to have reviewed was rendered on March 25, 1957. No order for a rehearing of the case or for an extension of time within which to petition for certiorari was ever requested. The judgment separately dealt with and decided two distinct issues, both of which Petitioners seek to have reviewed by this Court. In the interest of brevity, the first issue will be referred to in this Petition as "The Assignment Issue." and the second as "The Health Insurance Exemption Issue."

Petitioners believe that Section 1254(1) of the Federal Judicial Code (U.S.C.A. Title 28, Sec. 1254(1)) sanctions this Court's jurisdiction to review the judgment in question. Other jurisdictional elements will be separately considered below in relation to the respective issues resolved and decided by the judgment.

The Assignment Issue.

1. The judgment misapprehended and misapplied the principle enunciated by this Court in the cases of *Helvering* v. *Eubank*, 311 U. S. 122, 61 S. Ct. 149, 85 L. E. 81 (1940) as that case has been amplified and explained in later decisions of this Court.

The facts of the *Eubank* case presented two assignments, one of future commission income under a Life Insurance Agent's Contract, the other of a Life Insurance Agent's Contract with its attendant future commission income. The opinion of this Court in the case seemingly assimilates both assignments to the situation of an assignment of commission income solely. The ambiguity thus presented gave rise to this issue, the Government contending that the case stands broadly for the principle that an assignment of an Agent's Commission Contract

in its entirety constitutes merely an assignment of future income, not, as Petitioners contend, of the contractual source of the income as well.

2. The judgment is in conflict with the judgments of other United States Courts of Appeal and of this Court in analogous cases.

3. Involving as it does an important area of Federal Income Tax law, this issue is much in the public interest.

The Health Insurance Exemption Issue.

This issue closely approximates the issue decided by this Court on April 1, 1957, in the case of *Haynes* v. *United States*, ... U.S. ....., 77 S.Ct. 649, ... L. Ed. ..... The 7th Circuit Court of Appeals, of course, had no knowledge of the judgment of this Court in the *Haynes* case, which was handed down six days subsequent to the date of its judgment.

The reasoning assigned by the Court of Appeals in support of its Judgment on this issue is repugnant to the principles enunciated by this Court in the *Haynes* case.

Involving as it does an important area of Federal Income Tax law, this issue is much in the public interest.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the absolute and gratuitous assignment of an employment contract between a life insurance company and its general manager, which predicated a part of compensation upon a percentage of life insurance premiums receivable by the employer over the premium paying period of life insurance policies written by it within the fifteen year period of the employment contract, (the assignment occurring nearly twelve years after the ex-

piration of the period of the employment contract when the assigning employee had no duties or obligations whatsoever under such contract) shifted to the assignee the Federal income tax liability respecting commissions accruing and paid to the assignee subsequent to the date of assignment, with resulting exoneration of the assignor from such liability?

2. Whether under the principle enunciated by this Court in its Opinion in the case of *Haynes v. United States*, ... U.S. ....., 77 S. Ct. 649, ... L. E. ....., the exemption of health insurance benefits under Section 22(b)(5) of the 1939 Internal Revenue Code, is rightly denied to an employee in relation to the period of his last illness because the notice of sickness, the employer's office procedures in qualifying benefits and the form of benefit payments were abbreviated and unconventional?

3. Whether under the principle enunciated by this Court in its Opinion in the case of *Haynes v. United States*, ... U. S. ....., 77 S. Ct. 649, ... L.E. ....., the exemption of health insurance benefits under Section 22(b)(5) of the 1939 Internal Revenue Code is rightly denied to an employee because such employee, who had been either General Manager or Chief Executive of the employer from its beginning, voluntarily, while invalided in his home during his last illness, conferred with his employer's officials relative to the employer's business affairs?

STATUTES.

The Assignment Issue.

This issue before the Courts below was considered without reference to a particular section of the Internal Revenue Code, there being no question as to liability for the tax on the part of either the assignor or assignee. In general, Section 22(a) of the Internal Revenue Code 1939,

(1940) U.S.C.A. Section 22(a) applies, which section reads as follows:

> "(a) General Definition — 'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever."

The Health Insurance Exemption Issue.

Section 22(b)(5) of the Internal Revenue Code 1939, applies to this issue, same reading as follows:

> "Sec. 22(b) The following items shall not be included in gross income and shall be exempt from taxation under this chapter: * * * *
>
> "(5) Compensation for injuries or sickness— Amounts received, through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness;"

STATEMENT OF CASE.

The Assignment Issue.

The assignment issue resulted from a gift assignment on March 31, 1932 of an employment and commission contract dated July 1, 1905. The assignment appears as Exhibit B of the Stipulation of Facts, pages 24-25 of certified Appendix to Plaintiffs' Brief below. The employment and commission contract appears as Exhibit "A" of the Stipu-

lation of Facts, pages 18-23 of certified Appendix to Plaintiffs' Brief below.

The assignment was absolute and unlimited and purported to transfer all rights, title and interest of the transferor in the employment and commission contract to his wife and children.

The employment and commission contract was between The Lincoln National Life Insurance Company and Arthur F. Hall, now deceased. It provided for compensation in terms of a stated annual salary, supplemented by a commission interest in life insurance premiums received by the employer under life insurance policies written by it during the fifteen year period of the contract. The commission right attached to premiums payable throughout the terms of life insurance policies written within the fifteen year contract period, whether or not actual payment of the premiums fell within or beyond such fifteen year period. The employment and commission contract was in connection with the promotion of a new life insurance company. The commission element of the compensation was bracketed in relation to the measure of success Hall might attain in developing all departments of the company's business, of which the Sales or Agency Department was but one.

On March 31, 1932, nearly twelve years after Hall ceased to have any active duties under the employment and commission contract, said contract was absolutely and gratuitously assigned by Hall to his wife and children.

Hall died on November 9, 1942. Throughout the years subsequent to the assignment and preceding Hall's death, Mrs. Hall paid Federal Income Tax upon commissions earned and paid under the employment and commission contract. The Government made no objection to Mrs.

Hall's assumption of the Income Tax liability respecting the commissions* until after Hall's death, when an audit was made respecting the 1941 and 1942 returns of Hall and Mrs. Hall. In such audits the Government asserted, on the authority of *Helvering* v. *Eubank*, 311 U.S. 122, 61 S. Ct. 149, 85 L.E. 81, 1940, that the liability for the tax rested upon Hall or his estate rather than upon Mrs. Hall.

The Health Insurance Exemption Issue.

This issue arose under an "Employees' Life Insurance Plan" of The Lincoln National Life Insurance Company in relation to its employee and officer, Arthur F. Hall. The plan was set out in the Company's Office Manual, pertinent portions of which appear on pages 26-29 of the certified "Appendix to the Plaintiffs' Brief" below. This plan was determined to be "Health Insurance" within the meaning of Section 22(b)(5) of the 1939 Internal Revenue Code, by the 7th Court of Appeals in the case of *Epmeier* v. *United States*, 199 F. 2d 508 (42 A.F.T.R. 716) (1952), which case was tacitly approved by this Court in the *Haynes* case decided on April 1, 1957.

The Employees' Life Insurance Plan provided for health benefits predicated upon factors of compensation and length of service. For employees such as Hall, having ten years or more of service, the monthly benefits were scheduled at an amount equal to full salary for six months and at an amount equal to one-half of salary for the succeeding six months.

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* The quiescence of the Government was resultant of an adjudication by the Court of Appeals of the District of Columbia in the case of **Hall v. Burnet**, 54 F. 2d 443 (1931), certiorari denied, 285 U.S. 552, 52 S.Ct. 408, 76 L. E. 942 (1931), holding that an earlier assignment of the same employment contract shifted the income tax incidents to the assignee.

The plan by its terms provided for a medical examination although no application for coverage in the conventional sense was required. No provision was contained in the plan relative to notice or proof of disability, nor concerning any office arrangements or procedures incidental to the payment of benefits. All that the plan called for as a condition to its benefits was a state of disability due to injury or illness.

Hall became acutely ill of a cardiovascular-renal disease in the spring of 1942. On May 11, 1942 he took to his home and bed. For a considerable portion of the six months' confinement preceding his death on November 9, 1942, he had frequent conversations with officers of his employer concerning business matters.

BASIS OF FEDERAL JURISDICTION IN UNITED STATES DISTRICT COURT.

The original proceeding instituted in the United States District Court for the Northern District of Indiana, was for the recovery of Federal Income Tax alleged to have been erroneously or illegally assessed and collected (Sections 1331, 1340 and 1346(a)(1); U.S.C.A. Vol. 28).

ARGUMENT.

The Assignment Issue.

1. This Court in its Rule 19 conditions its jurisdiction of review on Writ of Certiorari upon the existence of "special and important reasons" for its exercise. In exampling the character of reasons which will be considered, these situations are noted: "Where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter; * * * or has decided an important question of federal law which has not been, but should be, settled by this Court; or has decided a federal question in a way in conflict with applicable decisions of this Court." For the reasons stated below, Petitioners believe that The Assignment Issue of this case fulfills completely the Court's criteria of jurisdiction as stated in its Rule 19:

The judgment of the Court of Appeals holds that an employment commission contract, entirely executed except for the obligor's continuing obligation to pay accruing commissions to the obligee, cannot be gratuitously assigned as a piece of property, with a consequent shift from the assignor to the assignee of the income tax obligation in relation to commissions accruing subsequent to the date of the assignment.

The judgment of the Court of Appeals affects over 100,000* life insurance agents alone, not to mention com-

* The 1956 Life Insurance Fact Book, published by Institute of Life Insurance, (Library of Congress card number 47-27134) states on page 49 that there were in the year 1956, a total of 189,600 full time life insurance agents in the United States.

mission agents associated with other forms of business, in that the right to make gifts of commission contracts, with transference of all legal incidence of such contracts, is a valuable element of that form of property, just as it is in the case with other forms of property.

While this Court's decision in the *Eubank* case related to a factual situation involving as one of its elements a commission contract absolutely and gratuitously assigned, the parties to this proceeding are in controversy as to the principle and scope of the decision, the Petitioners contending that the decision merely adheres to the general rule of this Court to the effect that an assignment of income alone, detached from the res giving rise to such income, does not result in a shift of the income tax obligation to the assignee, and, the Respondent, on the other hand, contending that the rule of the case extends as well to an absolute assignment of the res and to its attendant incident of income. Because of the doubt concerning the meaning of this Court's opinion in the *Eubank* case, Petitioners believe that there is involved in this issue the decision of an important question of Federal Law which has not been clearly settled by this Court, and one which should be settled by this Court.

Inasmuch as Petitioners' request that this Court exercise its jurisdiction to review the Court of Appeals' judgment on this Issue is based upon an asserted ambiguity of this Court's opinion in the *Eubank* case, a discussion of such issue calls for a brief, yet careful analysis of the *Eubank* decision, which will here be attempted.

The assignments involved in the *Eubank* case should be carefully distinguished. One assignment clearly involved future commissions only without reference to the agency contract, while the other purported to assign the agency contract itself, together with the attendant future com-

missions. For divergent reasons, the parties to the case were impelled to consider both assignments as involving future commission income only. With such a record before it, this Court disposed of the case by assimilating it to the situation and the rule of the companion case, *Helvering* v. *Horst*, 311 U.S. 112, 61 S. Ct. 144, 85 L. Ed. 75 (1940), and, in so doing, stated:

> "No purpose of the assignments appear other than to confer on the assignees the power to collect the commissions, which they did in the taxable year. The Government and Respondent have briefed and argued the case here on the assumption that the assignments were voluntary transfers to the assignees of the right to collect the commissions as and when they became payable, and the record affords no basis for any other."
>
> "For the reasons stated at length in the opinion in the *Horst* case, we hold that the commissions were taxable as income of the assignor in the year when paid. The judgment below is reversed."

These paragraphs, which constitute the essence of the opinion, give rise to the controversy between Petitioners and the Respondent. Did the Court intend to single out the *Eubank* case as an exception to its general rule that power and dominion over property is the test to be applied in determining who is under obligation to discharge the income tax burden respecting income derived from such property, or did it intend merely to consider both assignments, on the record before it, as involving incomes detached from their contractual sources because the case as developed by the parties presented no other issue? In this query is presented the crux of Petitioners' prayer that this Court review the judgment of the Court of Appeals.

Although this Court in many cases decided after the *Eubank* case has pointed out that said case and the *Horst* case dealt with situations wherein the taxpayer had made assignments of income from property and had "parted with no substantial interest in property other than the specified payment of income," (*Pearce* v. *Commissioner*, 315 U.S. 543, 62 S. Ct. 754, 86 L. E. 1016, (1942)) yet the Government and the Court below remain unconvinced, and the fact that the following decisions of this Court and of United States Courts of Appeal can be cited in support of the same point, has proved unavailing:

Harrison v. *Schaffner*, 312 U.S. 579, 61 S. Ct. 759, 85 L.Ed. 1055 (1941).

Helvering v. *Stuart*, 317 U.S. 154, 63 S.Ct. 140, 87 L.Ed. 154 (1942).

Commissioner v. *Sunnen*, 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898 (1947).

Overton v. *Commissioner*, 162 F. 2d 155 (2nd C.C.A. 1947).

Commissioner of Internal Revenue v. *Giannini*, 129 F.2d 638 (9th C.C.A. 1942).

Mahaffey v. *Helvering*, 140 F. 2d 879 (8th C.C.A. 1944).

Hyman v. *Nunan*, 143 F. 2d 425 (2nd C.C.A. 1944).

Paxson v. *Comm. of Internal Revenue*, 144 F. 2d 772, (3rd C.C.A. 1944).

Heyman v. *Commissioner*, 176 F.2d 389, (2nd C.C.A. 1949).

White v. *Fitzpatrick*, 193 F. 2d 398, (2nd C.C.A. 1951).

Commissioner v. *Clark*, 202 F. 2d 94, (7th C.C.A. 1953).

Galf v. *Commissioner*, 216 F. 2d 41, (7th C.C.A. 1954).

Caldwell v. *Campbell*, 218 F. 2d 567, (5th C.C.A. 1955).

2. The judgment of the Court of appeals is in conflict with the established doctrine of this Court that the Federal Income Tax obligation respecting income derived from property rests upon the person who has dominion and control of the property. This doctrine has been developed in a long series of cases among which are the following:

Helvering v. *Horst*, 311 U.S. 112, 61 S. Ct. 144, 85 L. Ed. 75 (1940).

Commissioner v. *Sunnen*, 333 U.S. 591, 68 S. Ct. 715, 92 L. Ed. 898 (1947).

3. The judgment of the 7th Circuit Court of Appeals on this issue is in conflict with the decision of other Courts of Appeal on the same issue:

(a) In the case of *Hall* v. *Burnet*, 54 F. 2d 443 C.A.D.C. (1931), and in the same case on second appeal, 68 F. 2d 399 C.A.D.C. (1933), an absolute assignment of the identical employment and commission contract involved in this case was in issue. The holding in these cases is expressed in the following quotation from the opinion on the first appeal:

> "From this it is obvious that if what was here sought to be conveyed from the husband to the wife was salary, or personal earnings, the same would still be taxable to him though he never actually received it, but in the view we take of this case, what was assigned was neither income nor earnings, but property. It was not an assignment of future earnings but the transfer of property right, and though this property right gave rise to future income, uncertain and contingent though it might be as to amount, that fact does not destroy the distinction. In this case, the contract between appellant and the insurance company gave him a property right in all renewal

premiums on all business written for the company by him or by others during the period of the contract. Undoubtedly, his right to these commissions would survive his death and would pass to his estate to the same extent and in the same way as other property which he then possessed. In these circumstances, it is obvious that the right was fixed and certain, and was independent of any future service to be rendered by him. Any uncertainty in the situation concerned only the amount; but the agent's rights as against the insurance company were established. When, therefore, the contract was assigned to his wife, a property right passed to her, as capable of assignment as any other sort of property; for instance, as rents to accrue from a lease for a term of years, or royalties from a patent."

(b) Until the decision of the *Eubank* case, the Government accepted and applied the rule of the *Hall* cases to the assignment involved in this case.

(c) Before and after the decision of the *Eubank* case, the *Hall* cases have been cited and approved in the following cases decided by United States Courts of Appeal:

Helvering v. *Seatree*, 72 F. 2d 67 (C.A.D.C. 1934).

Swartz v. *Commissioner*, 69 F. 2d 633 (5th C.C.A. 1934).

Lowery v. *Helvering*, 70 F. 2d 713 (2nd C.C.A. 1934).

Washington v. *Commissioner*, 80 F. 2d 829 (2nd C.C.A. 1936).

Commissioner v. *Ross*, 83 F. 2d 18 (6th C.C.A. 1936).

Bell's Estate v. *Commissioner*, 137 F. 2d 454 (8th C.C.A. 1943).

Sunnen v. *Commissioner*, 161 F. 2d 171 (8th C.C.A. 1947).

Dreymann v. *Commissioner*, 11 T.C. 153 (1948).

Petitioners recognize that this point 3 is only pertinent if their position concerning the meaning of the *Eubank* decision is determined to be correct.

The Health Insurance Exemption Issue.

This issue presents an interesting judicial sequence:

1. The case of *Epmeier* v. *United States*, decided by the Court of Appeals for the 7th Circuit in 1952, involving the identical Sickness Insurance Plan presented in this case.

2. The case of *United States* v. *Haynes*, 233 F. 2d 413, decided by the Court of Appeals of the Fifth Circuit in April, 1956, involving a Disability Insurance Plan substantially identical with the plan involved in the *Epmeier* case, the Court declining to follow the *Epmeier* case.

3. This case below, decided on March 25, 1957 by the same Court that decided the *Epmeier* case, reaching a contrary result, notwithstanding the identity of the Sickness Insurance Plans involved in the two cases.

4. Review by this Court of the *Haynes* case on certiorari with decision on April 1, 1957, reversing the Court of Appeals and affirming the District Court (139 F. Supp. 671 (1955)) which had followed the decision in the *Epmeier* case.

This Court in the *Haynes* case and the 7th Circuit Court of Appeals in the *Epmeier* case recognized and applied the elementary principle that, in so far as Section 22(b)(5) of the 1939 Internal Revenue Code is concerned, insurance is a contractual thing involving the assumption of risk. Beginning with that ancient and elementary principle, this Court swept aside as irrelevant the conventional trappings.

of insurance in determining whether a situation of insurance was presented. Accordingly, this Court in its opinion in the *Haynes* case and, inferentially, through its affirmance of the judgment of the District Court in that case, held irrelevant the following unconventional features of the benefit plan involved in said case, namely: The fact that there was no formal application for coverage; the fact that there was no medical examination; the fact that the benefits payable were not stated with exactitude in that a Committee might modify the amount of such benefits if the situation warranted; the fact that the consideration for the benefits was not expressed in terms of periodic monetary premiums; the fact that the employer maintained no reserves to cover its liability for benefits; the fact that the employer charged the expense of the benefit plan to its cost of doing business, rather than to the cost of insurance determined actuarially; the fact that benefits were sometimes paid in combination with salaries or wages; the fact that the cost of the benefit plan was carried on the books of the employer under its wage or salary schedules; the fact that the employer was not licensed as an insurance company; the fact that the benefits were measured in terms of the employee's period of service with the employer; the fact that the plan was subject to change without the consent of the employees in so far as unmatured benefits were concerned; the fact that the benefits, after a stated number of years of service, were equal to the salary or wages paid at the time of disability, and the fact that commercial insurance companies do not normally relate the amount of insurance to the period of service and do not offer coverage in excess of 80% of salary.

In the face of the rule it had revived and revitalized in the *Epmeier* case, the 7th Circuit Court of Appeals in the instant case held that amounts paid to Hall during his last illness were not sickness insurance benefits:

(a) Because there was evidence that Hall voluntarily counseled with officers of his company concerning business matters during the period of his home confinement on the occasion of his last illness. The Sickness Benefit Plan contained no conditions respecting an employee's activities during the period of his illness, requiring merely that a condition of illness exist. (See Exhibit "H", page 26 of Appendix to Plaintiffs' Brief.)

(b) Because there was evidence that formal notice of illness was not given to Hall's employer, and because payments to Hall during his illness were made by payroll checks rather than by checks separately designed for use in paying sickness benefits. The Sickness Benefit Plan contained no condition or requirements relative to these matters.

It is Petitioners' understanding of this Court's judgment in the *Haynes* case that, for the purposes of Section 22(b)(5) of the 1939 Internal Revenue Code, health insurance is what it is contractually, unrelated to the conventions that have attached to it in the course of its commercial use and development. The 7th Circuit Court of Appeals applied the rule that, for a payment to be insurance, the insured, in addition to being sick (a fact not disputed in this case), must not speak to his office associates about his employer's business, even though his life has been one of complete devotion to such business, and, further, that a payment to a sick employee is not to be regarded as insurance unless all conventional niceties of office procedures are followed as to proof of loss and payment of benefits, even in the case of an employee such as Hall, whose condition was minutely within the knowledge of all officers of his employer.

The Seventh Court of Appeals on March 25, 1957, when it reached its decision on the issue under consideration, did not have before it this Court's decision in the *Haynes* case, which bears date of April 1, 1957. The latter case was first reported in the April 15, 1957 Advance Sheet, with the consequence that Petitioners did not have an opportunity through a petition for rehearing to bring said case to the attention of the Court of Appeals. Except for this Court's jurisdiction of review on certiorari, Petitioners are without a judicial remedy to have the decision of the Court of Appeals tested by the rule announced in the *Haynes* case. This fact Petitioners respectfully submit should be considered by the Court in passing upon the Petition for a review of the issue on certiorari.

Respectfully submitted,

CLYDE J. COVER
Attorney for Petitioners

APPENDIX.

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 11920 OCTOBER TERM 1956—JANUARY SESSION 1957

WILLIAM B. F. HALL, AILEEN HALL SHOAFF, ARTHUR F. HALL, JR., ALVA J. MCANDLESS and FRED B. SHOAFF, II,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

March 25, 1957.

Before DUFFY, *Chief Judge*, FINNEGAN and SWAIM, *Circuit Judges.*

SWAIM, *Circuit Judge.* This is an action for the recovery of income tax alleged to have been erroneously assessed and collected for the year 1941 and the period January 1, 1942 to November 9, 1942. From an adverse judgment below the plaintiffs appeal.

This is another case which presents an attempt to shift the incidence of taxation from one person to another by means of an anticipatory assignment of income. On July 1, 1905, Arthur F. Hall (hereinafter referred to as decedent) entered into an employment contract with the Lincoln National Life Insurance Company (hereinafter re-

ferred to as Lincoln). This contract provided for a basic salary of $2,600 per year and commissions, based upon a percentage of renewal premiums on all life insurance policies written by Lincoln during the period ending fifteen years from the effective date of the contract. Lincoln has continued to this day to pay the commissions under the contract either to decedent, his widow or his children, but only on such life insurance as was written during the fifteen year period.

In 1923 decedent became president of Lincoln and held this office until February 1939. At that time he became chairman of the board of directors and held this office until his death on November 9, 1942.

On March 31, 1932, decedent executed an instrument purporting to be a gift assignment of the employment contract to his wife, Ann O'Rourke Hall, and contingently to his children. Mrs. Hall reported as a part of her gross income all commissions paid to her under the terms of the assignment. She received thereunder $4,749.33 during the year 1941 and $3,799.99 during the period January 1, 1942 to November 9, 1942—the only taxable years involved in this case.

The District Court held that the commissions were taxable as income of the decedent-assignor on the authority of *Helvering* v. *Eubank*, 311 U. S. 122, which the trial court considered to be factually identical in all material respects with the instant case. We agree. However, plaintiffs contend that the *Eubank* case is distinguishable because here the decedent assigned the agency contract, and not merely the right to collect the commissions. Although there is some language in the *Eubank* opinion that lends color to the suggestion that the majority opinion treated the assignments therein as transferring only the right to collect the commissions, we think the opinion was predicated on the fact that as to at least one of the assignments the agency contract was transferred. But even assuming that plaintiffs are correct, the distinction is without a difference. Neither the assignee's interest nor any interest retained by the assignor would have been any greater or

smaller had the assignment in question purported to transfer merely the right to collect the commissions. Plaintiffs, with reference to the tree-fruit metaphor, insist that the agency contract represents the tree and the commissions, the fruit, and that decedent transferred the tree to Mrs. Hall along with the incidence of taxation. The difficulty with this argument is that there was no tree other than decedent himself. The commissions were the result of personal services performed by decedent in the past, and in consideration of these services decedent obtained an enforceable promise from Lincoln that he would be paid a certain percentage of renewal premiums on all life insurance written during the contract period. The agency contract is no more than the embodiment of decedent's employment arrangement with Lincoln, and the commissions "grew" not from this contract, but from the services rendered by decedent to Lincoln. See *Strauss* v. *Commissioner of Internal Revenue*, 2 Cir., 168 F. 2d 441, certiorari denied 335 U. S. 858. When this transaction is viewed in light of the distinction between a transfer of income derived from an obligation to pay compensation and a transfer of income-producing property, see *Blair* v. *Commissioner of Internal Revenue*, 300 U. S. 5, it must be characterized as the former. Therefore, this is simply a case where income must be taxed to the one who has earned or otherwise has created the right to receive it or to enjoy the benefit of it when paid, notwithstanding the fact that decedent gave away his right to the income in advance of payment *Helvering* v. *Horst*, 311 U. S. 112; *Lucas* v. *Earl*, 281 U. S. 111.

Plaintiffs' reliance on *Hall* v. *Burnett*, App. D. C., 54 F. 2d 443, certiorari denied 285 U. S. 552, and *Hall* v. *Helvering*, App. D. C., 68 F. 2d 339, is misplaced. Those cases involved earlier partial assignments of decedent's employment contract to his wife. The government challenged the assignments on the same grounds urged here, but decedent prevailed. However, the reasoning of the court in those cases was expressly rejected by the decision in the *Eubank* case, and they are therefore no

longer authority on the question presented by this appeal. See *Knapp* v. *Commissioner of Internal Revenue*, 40 B.T.A. 1145, rev'd 121 F. 2d 454 (2 Cir.) on the authority of *Helvering* v. *Eubank*, 311 U. S. 122 and *Helvering* v. *Horst*, 311 U. S. 112.

The second issue presented by this appeal is whether the sum of $2,400 was properly excluded from decedent's tax return for the period January 1, 1942 to November 9, 1942, as an amount received through health insurance within the meaning of Section 22(b)(5), 26 U.S.C.A. (I.R.C. 1939). The District Court held that it was not. Decedent for some years prior to 1942 had suffered from arteriosclerosis. In February 1942, he became ill while in Florida, having developed a condition associated with arteriosclerosis. Subsequent to May 11, 1942, decedent did not return to his office, although he continued to occupy himself with company affairs until his death in November 1942. His duties apparently did not make it necessary for him to attend his office each day. Decedent continued to engage in establishing company policy and he frequently conferred with executives of the company, and his secretary worked with him at his home almost every day. In short, it appears that decedent was performing substantially all the duties of his office and that his effectiveness and product output with regard to company matters were not diminished to any great extent. In addition, the normal procedures utilized by Lincoln in determining whether an employee was entitled to sickness benefits were not followed in decedent's case and the payment of the sum had all the appearances of a salary disbursement. In such circumstances we believe the District Court properly found that the $2,400 was received as compensation for services, and was not an amount received through health insurance within the meaning of Section 22(b)(5).

The judgment of the District Court is AFFIRMED.

A true Copy:

Teste:

/s/ Kenneth J. Carrick
Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify, that the foregoing ..... pages contain a true copy of the Appendix to Plaintiffs' Brief, filed December 19, 1956; Opinion, filed March 25, 1957 and Judgment, entered March 25, 1957, in

Cause No. 11920

William B. F. Hall, Aileen Hall Shoaff, Arthur F. Hall, Jr., Alva J. McAndless & Fred B. Shoaff, II,

Plaintiffs-Appellants,

vs.

United States of America, Defendant-Appellee.

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-second day of April A. D. 1957.

/s/ Kenneth J. Carrick
Clerk of the United States Court of Appeals for the Seventh Circuit.

(Seal)

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Monday, March 25, 1957.

Before

Hon. F. Ryan Duffy, Chief Judge
Hon. Philip J. Finnegan, Circuit Judge
Hon. H. Nathan Swaim, Circuit Judge

WILLIAM B. F. HALL, AILEEN HALL SHOAFF, ARTHUR F. HALL, JR., ALVA J. MCANDLESS and FRED B. SHOAFF, II, *Plaintiffs-Appellants,* vs. UNITED STATES OF AMERICA, *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

No. 11920

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Fort Wayne Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs.